IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.7458 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UNION OF INDIA

Versus

PENT OCEAN STEAM SHIPS PVT LTD

Appearance:

1. Special Civil Application No. 7458 of 2003

MR SN SHELAT, AG with MR MG NAGARKAR for Petitioner No. 1

MR JR NANAVATI with MR AR THACKER for Respondent No. 1

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 10/07/2003

ORAL JUDGEMENT

1. This is a petition under Article 226 of the Constitution of India whereby the petitioner has challenged the validity and legality of the order passed by the nominee of the Chief Justice (hereinafter referred to as 'the designated Judge') in O.J. M.C.A. No.61 of

2002 on 17-01-2003 under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996').

2. The petitioner is the Union of India, owing the Eastern, Western and Southern Railway. The petition has been preferred through the General Manager, Western Railway. The respondent is a Private Limited Shipping Company.

Heard Mr.S.N.Shelat, the learned Advocate General appearing with Mr.M.G.Nagarkar on behalf of the petitioner and Mr.J.R.Nanavati appearing with Mr.A.R.Thacker on behalf of the respondent. The petition is taken up for final disposal with consent of both the sides. RULE. Mr.Nanavati waives service of rule on behalf of the respondent.

3. It appears that the petitioner entrusted the respondent a consignment of Steam Coal weighing 8393 M.T. for Safe Carriage by Sea from Port of Calcutta to the Port of Okha on 07-10-1982. The respondent accepted the aforesaid consignment for carriage for consideration of freight and issued a Bill of Lading dated 07-10-1982. It is the case of the petitioner that in terms of the Bill of Lading issued by the respondent the consignment of goods owned by the petitioner was to be delivered at the Port of Okha in sound and good conditions. Accordingly, the consignment was shipped on M.V. "Samudra Jyoti" owned by the respondent. Thereafter, due to various events, the consignment was lost at Sea. This is the starting point of the dispute. It is the say of the petitioner that the loss was occasioned due to negligent handling by the respondent, while the case of the respondent is that the loss was occasioned due to act of God or as stated, by perils excepted, in the Bill of Lading. The petitioner preferred a Special Civil Suit No.100 of 1983 on 21-10-1983 in the Court of Civil Judge (S.D.), Jamnagar claiming a sum of Rs.38,49,480=55 together with interest at 12% p.a. The suit was resisted on various factual as well as legal points by filing written statement on 21-07-1994. Issues were framed by the trial Court on 17-10-1996.

4. Thereafter, for various reasons, the suit was not being proceeded with. In the meantime, the suit came to be transferred to the Court of Civil Judge (S.D.), Khambhaliya and came to be renumbered as Special Civil Suit No.8 of 2002.

5. In the intervening period the respondent had

preferred claim against the Insurance Company and the same came to be decided in favour of the respondent. The amount deposited by the Insurance Company before the Prothonotary Mumbai High Court came to be attached and an injunction was obtained by the petitioner against the respondent from withdrawing the said amount. That injunction order continues till date.

6. As Special Civil Suit No.8 of 2002 was not being proceeded with, on 02-05-2000, the respondent moved an application Exh.164 seeking appointment of an arbitrator. The prayers were :

(i) the disputes between the parties be resolved by appointing an arbitrator;

(ii) a retired Judge of the High Court or the Supreme Court be appointed as an arbitrator;

(iii) reference be made to the Chief Justice, Gujarat High Court for appointment of an arbitrator;

(iv) For any other appropriate relief.

7. The petitioner filed its reply wherein without prejudice to the right of the petitioner to proceed with the suit, the petitioner declared that it had no objection against the appointment of an arbitrator. However, the petitioner put a condition to the effect that the arbitrator / arbitrators may be appointed only by the General Manager, Western Railway in accordance with the Standard Conditions of Contract with special reference to Clause 2900. The petitioner also stated in the reply that it was not agreeable to the reliefs prayed in paragraphs 8(2) and 8(3) of the application filed by the respondent i.e. appointment of a retired Judge and/or a reference to the Chief Justice of the High Court of Gujarat. On 04-12-2000, after considering the contentions of both the sides, the Court of Civil Judge (S.D.), Khambhaliya held that as the petitioner - railway was a party to the dispute, it was not open to the petitioner to insist for an officer of the railway being appointed as an arbitrator. Thereafter, in light of the fact that the suit was pending since 17 years, the petitioner was directed to suggest name of any retired Chief Justice of High Court or a Judge of the Supreme Court as sole arbitrator on or before 04-01-2001. Ultimately, on 08-01-2001, as the petitioner failed to suggest any acceptable name as sole arbitrator, retired

Chief Justice of Rajasthan High Court, Justice A.P.Ravani, was appointed as the sole arbitrator.

8. On 19-03-2001, the sole arbitrator recorded Minutes of Meeting. However, subsequently as the sole arbitrator felt that the appointment was not in terms of the provisions of the Act of 1996, the papers were returned to the Civil Judge (S.D.), Khambhaliya and the parties were directed to obtain necessary order from the Chief Justice as stipulated in Section 11 of the Act of 1996. Accordingly, the respondent preferred Arbitration Petition No.45 of 2001 on 24-07-2001. After notice was issued and upon hearing both the sides, Justice K.R.Vyas, designated Judge, passed the following order on 09-11-2001 :

"During the course of hearing of this matter, with a view to see that the long standing dispute between the parties comes to an end, I have asked the parties to suggest the names of arbitrators; one by each party, without prejudice to their rights and contentions. Thereafter these two appointed arbitrators shall appoint a Presiding Arbitrator, preferably a retired High Court Judge. Learned Counsel for the parties to take appropriate instruction in the matter by the next date of hearing. S.O. to 14-12-01.

Sd/-
9-11-01 (K.R.Vyas, J) "

9. Thereafter on 11-01-2002 Justice C.K.Buch, designated Judge, made the following order disposing off the Arbitration Petition.

" Heard Mr.JR Nanavati learned Senior Counsel and Mr.JC Sheth learned counsel for the parties.

The opponent hereinabove filed Special Civil Suit No. 100 of 1983 in the Court of Civil Judge (SD), Jamnagar inter alia praying therein for a decree of Rs.38,49,480-55ps together with interest at 12% p.a. from the date of the suit till the date of the payment against the petitioner. The applicant filed an application before the Civil Judge (SD), Khambhaliya where the suit was transferred from Jamnagar and the same was registered as Special Civil Suit No. 8 of 2000 in the file of Civil Judge (SD), Khambhaliya and prayed therein for appointment of arbitrator.

In compliance of the order passed by this Court on 9.11.2001, the parties have suggested names of Arbitrators. Mr Nanavaty has suggested the name of Mr.RS Cooper, Bat-At-Law [Linclon's Inn] Pandi Correspondents Pvt. Ltd., 27, Nariman Bhavan, 227, Nariman Point, Mumbai-21 and Mr. JC Sheth on behalf of Union of India, has suggested the name of Mr. DN Mathur, Chief Works Engineer, Western Railway, Churchgate, Mumbai as Arbitrators to resolve the disputes.

The suggestion received by letter dated 8.1.2002 from Sr. Divisional Mechanical Engineer, Western Railway, Rajkot and note of the learned counsel Mr. Avinash R. Thacker, are taken on record.

I hereby appoint both Mr. RS Cooper and Mr DN Mathur as Arbitrators and they are directed to appoint Presiding Arbitrator preferably a retired High Court Judge. The Arbitrators are authorised to act on ordinary copy of the Minutes authenticated by the Advocates for the parties. These Arbitrators shall hear and resolve the disputes between the parties preferably within six months.

The petition stands disposed of accordingly.

Sd/-

(C.K. BUCH, J.)

10. In compliance of the aforesaid order dated 11-01-2002, the two arbitrators appointed by the designated Judge appointed Former Chief Justice of the Andhra Pradesh High Court, Justice S.C. Pratap, to act as a Presiding Arbitrator. The Arbitral Tribunal held its meeting on different dates. The petitioner - railway disputed the scale of fees and expenses fixed by the Arbitral Tribunal by a written communication and as the scale suggested by the petitioner - railway was not acceptable to Justice S.C.Pratap, he resigned as the Presiding Arbitrator. In the circumstances, O.J. Misc. Civil Application No.61 of 2002 in Arbitration Petition No.45 of 2001 came to be moved by the respondent.

11. On 21-09-2002, the designated Judge, Justice C.K.Buch, passed the following order in O.J. M.C.A. No.61 of 2002 :

" The learned counsel appearing for the

parties, during the course of submissions jointly submitted in response to the certain queries raised by the Court that the parties may sit and negotiate qua the name of the arbitrator who can be appointed if agreeable by consent and the parties may also negotiate qua the fees of the arbitrator so that the consent of the arbitrator can be obtained well in advance. The parties have requested that this matter may be adjourned for some time so that consent order qua appointment of arbitrator can be passed. In the circumstances it is desirable that any retired Judge of High Court is appointed as arbitrator.

By consent S.O. to 11.10.2002. Direct service permitted.

Sd/-

(C.K.Buch - J) "

12. Thereafter, on 28-11-2002 Justice C.K.Buch, the designated Judge, made the following order :

" Heard ld. Senior counsel Mr. J.R. Nanavati for the petitioner and ld. counsel Mr.Nagarkar for the other side. Today, two letters are tendered for perusal by the ld. counsel appearing in the matter. The first letter is dated 4.10.2002 tendered by ld. counsel Mr. Nagarkar whereby Mr. Nagarkar has tried to pursue the matter with the railway administration so that any of the two retired Judges of High Court can be appointed as a Sole Arbitrator whose names are reflected in the above-said letter.

Ld. Senior counsel Mr. J.R.Nanavati, by furnishing letter dated 14.10.2002 received by the petitioner has pointed out that railway administration is not inclined to accept the names suggested by Mr.Nagarkar in the letter dated 4.10.2002 because of financial constraint / amount of fees to be paid to the arbitral tribunal and requested that now this Court should appoint any one of the two retired Judges of this High Court or any retired Judges of any High Court so that unnecessary protraction of litigation between the parties can be put to an end. Alternatively, Mr. Nanavati has submitted that initially Hon'ble Mr. Justice A.P.Ravani (Retired Chief Justice of Rajasthan High Court) was appointed as Sole Arbitrator by the Civil

Court and on resignation of Hon'ble Mr. Justice Patap, Hon'ble Mr. Justice Ravani can be appointed as Sole Arbitrator irrespective of the financial constraint to pay up fees by railway administration. It is submitted that petitioner can pay up fees and expenses and legitimately recover the same from the other side his share in view of the scheme reflected under sections 38 & 39 of the Arbitration & Conciliation Act, 1996.

Without going into the merits of these submissions, the request for time advanced by ld. counsel Mr. Nagarkar is accepted so that General Manager or any other responsible officer can take appropriate decision in the matter so that dispute can be referred to the Arbitrator at the earliest.

S.O. to 19.12.2002. No further adjournment will be granted.

Sd/-

[C.K. BUCH, J]"

13. Ultimately, on 17-01-2003 the impugned order came to be passed by the designated Judge, Justice C.K.Buch.

14. Accordingly, retired Chief Justice of Rajasthan High Court, Justice A.P.Ravani, held a preliminary meeting on 07-03-2003 at Mumbai and after issuing certain directions to the parties for filing additional pleadings the next arbitral meeting was fixed at Ahmedabad on 21-03-2003. On the said date i.e. 21-03-2003 an application with regard to the jurisdiction of the Arbitral Tribunal was raised by the petitioner - railway. Documents in support of the application were filed on 08-04-2003 and reply had been filed on 26-04-2003.

15. Thereafter on 30-04-2003 an application under Section 12(3)(b) of the Act of 1996 came to be made by the petitioner.

16. After hearing both the sides the application dated 21-03-2003 under Section 16 of the Act of 1996 and application dated 30-04-2003 under Section 12(3)(b) of the Act of 1996 came to be decided on 20-05-2003.

17. On behalf of the petitioner it was submitted that paragraph 15 of the order dated 20-05-2003 of the Arbitral Tribunal has given rise to the cause of action so far as the present petition is concerned. The said paragraph reads as under :

"15. In the instant case, by order dated 17/01/2003, the Honourable Judge (C.K.Buch, J), the nominee of Honourable the Chief Justice of Gujarat High Court, has, after hearing the parties, appointed sole arbitrator. While passing the order, he must have taken into consideration the provisions of Section 11(8) of the Act which enjoins upon Honourable the Chief Justice or any person designated by him to take into consideration ;

(a) any qualification required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

As far as arbitration agreement, which has been evolved between the parties during the pendency of the suit, is concerned, it does not make any reference to any specific qualification of an arbitrator. The Honourable Judge, as a designated nominee of Honourable Chief Justice, has thought it proper to appoint myself as sole arbitrator. As stated earlier, I have no jurisdiction to sit in the appeal over his order nor I can examine the order and decide upon its validity. If any party feels aggrieved, the same can be challenged before appropriate forum as decided by the Honourable Supreme Court in the case of Kokan Railways Vs. Rani Construction Pvt. Ltd. (supra). "

18. In support of various grounds urged in the petition it was submitted by Mr.Shelat that the entire order dated 17-01-2003 proceeded on an erroneous premise that the petitioner - railway had consented to the appointment of a sole arbitrator i.e. a retired Judge. It was submitted that as could be seen from the record, right since inception, the consent granted by the petitioner was conditional, and that the petitioner had no objection to the proceedings being referred to an arbitrator but the rider was that such an arbitrator had to be from amongst the officers designated by the General Manager, Western Railway. For this purpose reliance was placed on the Standard Conditions of Contract and it was submitted that as per the terms of the said condition no other arbitrator could be appointed. That the designated

Judge had already accepted the request and the stand of the petitioner when he passed the earlier order dated 11-01-2002 by incorporating name of one of the officers of the railway as one of the arbitrators. That in the present proceedings which were only required to substitute the name of the arbitrator already appointed, the designated Judge could not have removed the earlier order dated 11-01-2002 by substituting the name of a retired Judge as was done in the impugned order dated 17-01-2003.

18.1 Another objection taken against the impugned order was that the designated Judge had failed to abide by the provisions of Section 11(8)(a) of the Act of 1996 which stated that the Arbitrator had to be qualified. That while appointing the retired Chief Justice, the qualifications were not considered by the designated Judge and hence the entire appointment by virtue of the said order was vitiated and order was required to be quashed and set aside. Elaborating on the submissions it was contended that the impugned order does not consider the fact that as provided under Section 11(8)(a) of the Act of 1996 qualification of an arbitrator had admittedly been considered while appointing an arbitrator vide order dated 11-01-2002 but the said factor had been omitted from consideration while passing the impugned order.

19. Mr.J.R.Nanavati, the learned senior advocate appearing on behalf of the respondent, submitted that the Standard Conditions of Contract on which reliance has been placed by the petitioner do not form part of the contract. That the basis of the suit was only the Bill of Lading and the terms stated therein. Referring to the suit filed by the petitioner, it was submitted by Mr.Nanavati that the suit was primarily for the purpose of deciding whether the petitioner was entitled to any compensation if the respondent - defendant was shown to be negligent in any manner. Therefore, according to Mr.Nanavati, the reliance placed by the petitioner on the Standard Conditions of Contract was not well founded. In the alternative, it was contended that the conditions produced at Page 52 are incomplete conditions and do not suggest as to the effective period i.e. as to when did the conditions come into effect; as well as the very language of the conditions went to show that the same were not applicable to the instant case.

19.1 Repelling the contentions regarding failure to comply with provisions of Section 11(8)(a) of the Act of 1996, it was submitted by Mr.Nanavati that considering the nature of the dispute between the parties, no special qualification was necessary and the General Manager,

Western Railway was not in a position to designate an officer of railway who is an expert on shipping.

19.2 It was further submitted by Mr.Nanavati that the Minutes recorded by the Arbitral Tribunal dated 19-03-2001 go to show that there was an agreement between the parties, not only limited to appointment of an arbitrator, but also to the appointment of a sole arbitrator and that too a retired Judge of the High Court or the Supreme Court. Similarly, it was contended that the order dated 11-01-2002 made by the designated Judge was an order by consensus and the petitioner must not be permitted to take a contrary stand now.

19.3 It was further submitted that this petition under Article 226 of the Constitution of India does not require to be entertained as the conduct of the petitioner goes to show that it has not approached the Court with clean hands. Furthermore, it was submitted that the impugned order dated 17-01-2003 itself records as to why and how the sole arbitrator has come to be appointed. In this connection reference was made to the Minutes recorded by the Arbitral Tribunal in relation to fixation of fees and to subsequent correspondence entered into by the petitioner - railway which led to resignation of Justice S.C. Pratap.

19.4 In support of various contentions and more particularly that the impugned order does not deserve to be interfered with, reliance has been placed on decision of the Apex Court in the case of Konkan Railway Corpn. Ltd. and Ors. Vs. M/s. Mehul Construction Co., A.I.R. 2000 S.C. 2821. It was also submitted that the said decision has come to be confirmed by a Constitutional Bench of the Supreme Court in M/s. Konkan Railway Corporation Ltd. & Anr. Vs. M/s. Rani Construction P. Ltd., A.I.R. 2002 SC 778.

20. In rejoinder, on behalf of the petitioner, it was submitted that the emphasis by the respondent on the so-called consent of the petitioner in the earlier proceedings is misplaced. It was pointed out that right since inception the stand of the petitioner has been consistent that in case a sole arbitrator has to be appointed, the same should be from amongst the names suggested by the General Manager, Western Railway, and that no other arbitrator was acceptable to the petitioner. It was submitted that a petition under Article 226 against the order of a designated Judge was maintainable as laid down by a Full Bench of this Court in the case of New India Assurance Co. Ltd. Vs. Hanjer

Fibers Ltd., 2003 (2) G.L.R. 1146.

21. In the case of Konkan Railway Corpn. Ltd. & Ors. Vs. M/s. Mehul Construction Co. (supra) the Apex Court was called upon to decide the following two questions :

> "2. Two basic questions which really arise for consideration are, (1) what is the nature of the order that is passed by the Chief Justice or his nominee in exercise of power under sub-section (6) of Section 11 of the Act ? and (2) even if said order is held to be administrative in nature what is the remedy open to the person concerned if his request for appointment of an Arbitrator is turned down by the learned Chief Justice or his nominee, for some reason or other ? "

21.1 After referring to Uncitral Model Law on the basis of which the present Act of 1996 has been formulated, the Apex Court goes on to make reference to the statement of objects and reasons for the Act of 1996 and while analyzing and interpreting the scheme of the Act it is stated thus in relation to the nature and status of an order passed under Section 11 of the Act of 1996 :

> ". . . . . Bearing in mind the purpose of legislation, the language used in Section 11(6) conferring power on the Chief Justice or his nominee to appoint an arbitrator, the curtailment of the powers of the Court in the matter of interference, the expanding jurisdiction of the arbitrator in course of the arbitral proceedings, and above all the main objective, namely, the confidence of the international market for speedy disposal of their disputes, the character and status of an order appointing arbitrator by the Chief Justice or his nominee under Section 11(6) has to be decided upon. If it is held that an order under Section 11(6) is a judicial or quasi-judicial order then the said order would be amenable for judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a Court of law even against an order of appointment of an arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting Uncitral Model. If on the other hand, it is held that the

> order passed by the Chief Justice under Section 11(6) is administrative in nature, then in such an event in a case where the learned Chief Justice or his nominee refuses erroneously to make an appointment then an intervention could be possible by a Court in the same way as an intervention is possible against an administrative order of the executive. In other words, it would be a case of non-performance of the duty by the Chief Justice of his nominee, and therefore, a mandamus would lie. If such an interpretation is given with regard to the character of the order that has been passed under Section 11(6) then in the event an order of refusal is passed under Section 11(6) it could be remedied by issuance of a mandamus. We are pursuaded to accept the second alternative inasmuch as in such an event there would not be inordinate delay in setting the arbitral process in motion. But as has been explained earlier in the earlier part of this judgement, the duty of the Chief Justice or his nominee being to set the arbitral process in motion it is expected that invariably the Chief Justice or his nominee would make an appointment of arbitrator so that the arbitral proceeding would start as expeditiously as possible and the dispute itself could be resolved and the objective of the Act can be achieved. . . . . ."

22. Therefore, it is apparent that the order passed under Section 11(6) of the Act of 1996 is administrative in nature and intervention by the Court while exercising jurisdiction under Article 226 of the Constitution would be possible provided the designated Judge has failed to or refused erroneously to make an appointment of an arbitrator. In the present case, the said circumstances cannot be said to be available to the petitioner.

23. Therefore, the limited question that survives for consideration is whether the learned designated Judge having exercised the powers vested in him by virtue of provisions of Section 11 of the Act of 1996, it is possible for this Court to intervene in the order made appointing a sole arbitrator. On the assumption that, it is permissible for this Court to undertake such an exercise, a subsidiary question that will arise is as to the scope and extent of such intervention by this Court. It is not a case, admittedly, where the designated Judge has failed to exercise the power vested in him by virtue of the provisions of Section 11 of the Act of 1996.

Hence, the scope of intervention by this Court becomes very limited.

24. Whether an appointment of a sole arbitrator in the circumstances can be said to be beyond the scope of jurisdiction and powers of the designated Judge is the issue which then remains to be answered. The stand of the petitioner that it has not consented to the appointment of a retired Judge as sole arbitrator has to be appreciated in context of the entire backdrop of facts and circumstances in which the impugned order came to be made on 17-01-2003. Though, at the initial stage, in the proceedings before the Court of Civil Judge (S.D.), Khambhaliya, a conditional consent was given by the petitioner, the appointment of the sole arbitrator was found to be invalid as the same had been made without following the due procedure laid down in the Act of 1996. Therefore, one can ignore the entire proceedings as being bad in law. However, at the same time, the fact of the parties having participated in the proceedings, as could be seen from the Minutes dated 19-03-2001, is required to be borne in mind while appreciating the overall conduct of the petitioner.

25. On 11-01-2002, two arbitrators came to be appointed by the designated Judge; one each of the choice of the petitioner and the respondent respectively. The two arbitrators appointed the Presiding Arbitrator. Till that point of time there was no grievance. It was only at the stage when the Arbitral Tribunal fixed its scale of fees and expenses to be borne by both the sides that the petitioner - railway took objection resulting in the resignation of the Presiding Arbitrator and, for all intents and purpose, putting at nought the Arbitral Tribunal constituted by virtue of the order dated 11-01-2002. It was in this backdrop that the designated Judge was constrained to appoint a sole Arbitrator vide impugned order dated 17-01-2003. This appointment came to be made taking into consideration the financial constraints expressed on behalf of the petitioner.

26. On the other hand, reliance on the Standard Conditions of Contract by the petitioner - railway is to say the least, without any foundation. The petitioner has failed to show that the said condition formed part of the contract entered into with the respondent in 1982 when a consignment of Steam Coal was assigned to the respondent to be transported by Sea. Therefore, the insistence of the petitioner - railway that a sole arbitrator should be appointed only from amongst the officers named by the General Manager, Western Railway

cannot be accepted in absence of any such agreement shown to exist between the parties. At this stage it is not necessary to enter into the aspect as to whether those conditions were effective at the relevant point of time in 1982 or not because, as stated hereinbefore, it has not been shown by the petitioner that the said condition formed part of the contract entered into between the parties in 1982.

27. The contention raised on behalf of the petitioner regarding qualification of the arbitrator as provided in Section 11(8)(a) of the Act of 1996 though attractive at first blush does not bear close scrutiny. No foundation for insisting on such a qualification of an arbitrator has been laid at any stage, either in the present proceedings or before the Civil Court or before the designated Judge. An officer of the Railways, one Mr.D.N.Mathur, was appointed as one of the arbitrators on 11.01.2002; the petitioner has not shown that the said gentleman possessed certain special qualifications, without which the dispute cannot be resolved. It has not been shown that the dispute between the parties is such which requires the arbitrator to possess qualifications of a certain nature or degree, without which the sole arbitrator cannot effectively adjudicate upon the lis between the parties. At the cost of repetition it is required to be stated that the dispute is only in relation to determination of the fact as to whether the loss of the consigned goods was occasioned due to negligence of the respondent. The hollowness of the stand of the petitioner stands exposed when one considers that it is the petitioner which had filed the suit in a civil Court, which admittedly cannot be stated to be qualified as the petitioner would want; and arbitration application came to be moved by the defendant i.e. present respondent. In these circumstances, it cannot be stated that the impugned order dated 17-01-2003 has not taken into consideration the requirement of qualification of sole arbitrator as envisaged under Section 11(8)(a) of the Act of 1996.

28. As laid down by the Apex Court in the aforesaid decisions, all other questions raised by the petitioner can be dealt with by the Arbitral Tribunal and in fact they have already been dealt with in the order dated 20-05-2003.

29. Before parting : a word as to the conduct of the petitioner. As can be seen from various orders made during course of hearing of Arbitration Petition No.45 of 2001 and O.J.M.C.A. No.61 of 2002, more particularly

orders dated 09.11.2001, 11.01.2002, 21.09.2002 and 28.11.2002, the petitioner has chosen to approbate and reprobate. The petitioner has been reluctant to proceed with the arbitration proceedings and has adopted various dilatory tactics to frustrate the entire purpose of the Act of 1996. In fact, in the impugned order of 17.01.2003, the designated Judge has in no uncertain terms taken note of the procrastinating conduct of the petitioner and expressed displeasure. Suffice it to state that the petitioner is not an ordinary litigant having a personal interest / stake in the litigation; the petitioner ought not to have conducted itself in the manner it has. The earlier arbitral tribunal faced an untimely termination due to quibbling about fees by the petitioner. Most unfortunate : that is all that should be said, considering the value of the suit in 1983 filed by the petitioner.

30. Hence, in light of what is stated hereinbefore, this petition does not merit acceptance and no interference is called for in the impugned order dated 17-01-2003, there being no infirmity, factual or legal. The petition is accordingly rejected. Rule discharged. There shall be no order as to costs.

Sd/-

[D.A.MEHTA, J]

* * *

'Bhavesh'